IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

PENNSYLVANIA WATER & POWER COMPANY,
A CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the lower Court [R. 2307-2322] is reported as *Pennsylvania Water & P. Co. v. Federal Power Com'n,* 123 F. 2d 155.

JURISDICTION—STATEMENT OF THE CASE.

The petition for certiorari contains a statement of the grounds on which the jurisdiction of this Court is invoked [*supra,* 17] and a statement of the case [*supra,* 2-17].

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals erred:

1. In affirming, and not setting aside, the Commission's order.

2. In holding that the Commission (*a*) constitutionally (*i. e.*, consistently with the due process clause of the Fifth Amendment) can be, and (*b*) by section 4(g) of the Federal Power Act is, authorized to *order* petitioner to apply for a license.

3. In holding that by section 4(g) the Commission is given jurisdiction to determine that petitioner's dam has been unlawfully maintained and operated ever since 1910.

4. In construing section 23, as amended by the Act of 1935, as retroactive, making unlawful the continued operation and maintenance of a lawfully constructed dam operated ever since 1910.

5. In holding that the Susquehanna, at Holtwood, Pennsylvania, is a navigable water of the United States *within the meaning of the Act of 1899.*

6. In holding that petitioner's dam is unlawfully operated and maintained.

7. In holding that by the Act of 1935 Congress authorized the Commission to *retroactively overrule* SECRETARY TAFT'S and Mr. FRANKFURTER'S practical administrative construction of the Act of 1899, *as applied to the Susquehanna,* so as to outlaw a dam built on the faith of that construction and operated without Governmental objection for 25 years.

ARGUMENT.

I

A

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED, BY ANY STATUTE, TO *ORDER* ANYBODY TO ACCEPT—OR APPLY FOR—A LICENSE.

In the United States nobody can be *ordered* by an administrative body to accept a license or to make any other contract, on terms to be fixed by the body making the order. This is beyond the broadest administrative power; the most restricted "freedom of contract" includes "freedom * * * to refuse to make an agreement"—though *not* to refuse to put an agreement in writing [*H. J. Heinz Co. v. National Labor Relations Board*, 311 U. S. 514, 525-526]. In the *Appalachian* case this Court authorized no such order [311 U. S. 429, 401, 424; *supra*, 20].

No such power—nor power to order anybody to *apply for* a license, on terms not even stated in the order—is granted to the Commission by the general language of section 4(g). Section 4(g) should not be expanded by construction. Under the Federal Water Power Act of 1920 the Commission had no power to require anybody to become a licensee. In the Act of 1935 the amendments [including section 4(g)] to the Act of 1920 were requested by the Commission. These amendments were presented by the Commission to the House and Senate Committees, and were reported by the Committees, as "all minor"; the Commission's counsel testified that they make "no amendments to the licensing sections of the Water Power Act".[17]

[17] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, pages 384, 388, 450. House Report No. 1318, 74th Congress, 1st Session, pages 7-8. Senate Report No. 621, 74th Congress, 1st Session, pages 17-18.

Properly speaking, a "shot-gun marriage" is not a contract. Nor can anybody be *ordered* to *apply for* a marriage license—or a license under the Federal Power Act.

B

THE COMMISSION IS NOT—AND COULD NOT CONSTITUTIONALLY BE—AUTHORIZED BY THE ACT OF 1935, BY SECTION 4(g), TO *ORDER* MAINTENANCE AND OPERATION OF A DAM STOPPED, FOR THE SOLE PURPOSE OF EXACTING RANSOM FOR *NOT* STOPPING IT.

The lower Court bases its affirmance of the Commission's order on (*a*) the "continuing" "paramount authority" of the United States to "abate obstructions" "in the interests of commerce and navigation" [R. 2318-2321; 123 F. 2d 162-163] and (*b*) the *Appalachian* case, as overruling *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419 and *Wisconsin v. Illinois*, 278 U. S. 367, 415 [*supra*, 20-21]. But the Commission (if it possessed such power) did *not* exercise the sovereign power to "abate obstructions". On the contrary, it found that removal of petitioner's dam would *not* be "expedient and in the public interest" [*supra*, 4]. Nevertheless it ordered petitioner to apply for a license—containing an option to the Government to acquire the dam for less than its fair value [*Appalachian* case, 311 U. S. 377, 427-428]—as a *price* for *not* exercising power to "abate" it.

This reasoning and conclusion of the lower Court is contrary to the decisions of this Court. However broad may be the power to "abate obstructions in the interests of commerce", a *threat* to exercise such power (when *not* in the public interest) can not be used to exact money or property for *not* arbitrarily *abusing* the power. Congress "may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation [or

water-power (?)] or appropriateness to that end". [*United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419; *Wisconsin v. Illinois*, 278 U. S. 367, 415]. The broader the power may be, the clearer this limitation is. The "paramount authority of the United States", to "abate obstructions" constructed with its express consent [*Louisville Bridge Co. v. United States*, 242 U. S. 409, 417], must extend to "obstructions" constructed under a Federal Power Commission license, no less than to obstructions expressly authorized by Act of Congress. But the United States could not, by *threatening* to "abate" a licensed dam, exact *new* or *additional* license terms or make other pecuniary or proprietary exactions, for *not* "abating" the dam. The *Appalachian* case does *not* support any such perversion of sovereign power or overrule the cases that deny such arbitrary power.

At all events, section 4(g) of the Federal Power Act does *not* delegate to the Commission either (*a*) the sovereign power of the United States to revoke its previous consent to construction of "obstructions" or (*b*) arbitrary authority to pervert such power by exacting ransom for *not* exercising it, when it is *not* in the public interest to exercise it. At most, section 4(g) is limited to orders "appropriate, expedient and in the public interest to conserve and utilize the navigation and water-power resources of the region". There is no evidence whatever—and no finding—[1] that *for practical purposes* there are at present any navigation resources or [2] that the water-power resources are *not* utilized to the utmost by petitioner [*supra*, 4, 15, 16; R. 207, 137].

The inalienable power of the United States to "abate obstructions"—*a fortiori*, the delegated power (if any)

of the Commission under section 4(g)—is in this respect no broader than the similar police power of the states over streets [*cf., Appalachian* case, 311 U. S. 377, 427]. Such power can *not* be used to exact payment for *not* exercising the power. [*Minor Privilege Cases*, 131 Md. 600, 609-610, 621-622].

C

BY THE ACT OF 1935, BY SECTION 4(g), THE COMMISSION IS *NOT* GIVEN JURISDICTION—AND THE JURISDICTION OF THE COURTS UNDER THE ACT OF 1899 IS *NOT* THEREBY OUSTED—TO DETERMINE WHETHER A DAM HAS BEEN UNLAWFULLY MAINTAINED AND OPERATED EVER SINCE 1910.

By section 4(g) the Commission is empowered "to order an investigation of any occupancy of, or evidenced intention to occupy", water for the purpose of developing electric power and "to issue such order as it may find appropriate, expedient and in the public interest to conserve and utilize the navigation and water-power resources of the region". Under this general language the Commission asserts—and the lower Court affirms—broad new *retroactive* powers, *e. g.*, to decide [1] that SECRETARY TAFT'S decision in 1904 was erroneous, [2] that from 1905 to 1910 petitioner's dam was constructed contrary to law and [3] that from 1905 to 1935 Congress never gave its consent, express or implied, to the construction and operation of the dam. Thus construed, section 4(g) supplants the existing jurisdiction of the Courts and broadens the Commission's limited powers (to do and require things specified in detail in Parts I, II and III of the Federal Power Act) into unlimited power to do and require *anything* relating to *occupancy* of water for power purposes.

Such a grant of power to an administrative body (if constitutional) is apparently unprecedented.[18] The distinction drawn by Mr. JUSTICE HOLMES between judicial action (which is based on "present or past facts" and existing laws) and legislative—or administrative—action (which "looks to the future" and makes "a new rule to be applied thereafter")[19] is generally, if not universally, observed. Questions of title to land, between a riparian owner and the Government, *arising 28 years after completion of a dam*, are essentially judicial questions, suitable for judicial decision by the courts—*not* for *retroactive* reversal by an administrative commission of a decision made 35 years before by its administrative predecessor *then* charged with the application and enforcement of the statutes in question.[20]

Properly construed, section 4(g), like section 4(a),[21] confers no such new substantive powers, but only authority to order investigations—and instigate judicial proceedings—in aid of the exercise of its substantive powers. In the *Appalachian* case the Circuit Court of Appeals distinguished between an "investigation" under section 4(a) and a "hearing". [*United States v. Appalachian Electric Co.*, 4 Cir., 107 F. 2d 769, 792].

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[18] See *Crowell v. Benson*, 285 U. S. 22, 58-61, and cases there cited, including *Ng Fung Ho v. White*, 259 U. S. 276, 282-285; *United States v. Appalachian Electric Power Co.*, 4 Cir., 107 F. 2d 769, 791.

[19] *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 226.

[20] *Helvering v. Reynolds*, 306 U. S. 110, 116, 117. *Cf. Arizona Grocery v. Atchison Ry.*, 284 U. S. 370, 389.

[21] Appendix, *infra*, 42.

II.

A.

THE ACT OF 1935, BY AMENDING SECTION 23 OF THE FEDERAL POWER ACT, DOES *NOT* MAKE UNLAWFUL THE CONTINUED OPERATION AND MAINTENANCE OF A LAWFULLY CONSTRUCTED DAM OPERATED EVER SINCE 1910.

In construing section 23 as retroactive [R. 2320-2321; 123 F. 2d 163], the lower Court misconstrues both the words and the purpose of the Act of 1935. That Act is *not* an "exercise by the United States of its paramount authority" [R. 2321; 123 F. 2d 163] to revoke its consent to an "obstruction" and "to abate the obstruction" [R. 2319; 123 F. 2d 162] in the interests of some particular river "improvement". It is merely a general law, containing new *prospective* prohibitions, similar to but slightly different from the successive prohibitions in the Rivers and Harbors Acts of 1890 and 1899.[22]

Under section 23(b),[23] "It shall be unlawful * * * to construct, operate or maintain" a dam except under "a permit or a valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act". The natural *prospective* construction of this prohibition is that it is applicable only to *construction* of dams *after the passage of the Act of 1935* and to *operation* or *maintenance* of dams *so constructed.*

Laws are not to be held retroactive unless that intention be clearly declared. [*Shwab v. Doyle*, 258 U. S. 528, 534-535 and cases cited].

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[22] See House Report No. 1318, 74th Congress, 1st Session, p. 25; Senate Report No. 621, 74th Congress, 1st Session, p. 47.

[23] Appendix, *infra*, 43.

Furthermore, section 23(a) is a saving clause to the same effect, viz., that the provisions of Part I of the Federal Power Act "shall not be construed as affecting any permit or valid existing right-of-way heretofore granted * * * or as affecting any authority heretofore given pursuant to law".[24] "Any authority given pursuant to law" is all-comprehensive, embracing alike any consent of Congress, express or implied, or authority under state law when Congressional consent was not required.[25]

B.

THE SUSQUEHANNA IS *NOT* A NAVIGABLE WATER OF THE UNITED STATES *WITHIN THE MEANING OF THE RIVERS AND HARBORS ACT OF 1899.*

The Act of 1899 was not an abstract essay on constitutional law. Nor was it a trap for those who might guess a *future* decision of this Court wrong, by relying on a *present* decision of the Secretary of War in charge of administration of the Act. The Act was a *practical* regulation of the construction and maintenance of "obstructions" in waters.

The *words* of the Act, "navigable water of the United States", are broad enough to embrace any water within the constitutional power of Congress. [*Economy Light*

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[24] Appendix, *infra*, 43.

[25] The Rivers and Harbors Act of 1890 (September 19, 1890, c. 907, 26 Stat. 454, Sec. 10) prohibited "the creation of any obstruction, not affirmatively authorized by law" to navigable capacity or "the continuance of any such obstruction" (with specified exceptions); this provision did *not* prohibit continuance of an obstruction authorized by state law. *United States v. Bellingham Bay Boom Co.*, 176 U. S. 211, 214-215; *Sanitary District v. United States*, 266 U. S. 405, 429; *Wisconsin v. Illinois*, 278 U. S. 367, 342.

Co. v. United States, 256 U. S. 113, 123-124]. But the *application* of these words to particular waters involves "questions of law inseparable from the particular facts to which they are applied"; each application of the legal test "is apt to uncover variations and refinements which require further elaboration" [*Appalachian* case, 311 U. S. 377, 404, 406]. Congress is at liberty to cut this Gordian knot by indicating that, as applied to any particular waters, the *words* of the Act shall be given *less* than their maximum possible scope. In the case of the Desplaines River Congress did *not* intend to limit the scope of the words. By the Act of 1899 itself $200,000 was specifically appropriated for the survey of the Desplaines; in 1910 $1,000,000 was appropriated for its improvement. [*Illinois v. Economy Power Co.*, 234 U. S. 497, 502, argument of counsel].

On the other hand, in more than 30 instances, from 1900 to 1937, Congress has by special acts declared a particular river or portion of a river to be *not* a navigable water of the United States *within the meaning of the Act of 1899.*[26] There is no reason why such Congres-

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[26] Cuivre River, in the counties of Lincoln and Saint Charles, Missouri, 1900 [33 U. S. C. A. §29].
Mississippi River, West Channel, opposite LaCrosse, Wisconsin, 1901 [33 U. S. C. A. §35].
Osage River, Missouri, in 1902 and 1904 [33 U. S. C. A. §41].
Grand River, Missouri, above Brunswick, 1905 [33 U. S. C. A. §30].
Sturgeon Bay, Illinois, 1907 [33 U. S. C. A. §44].
Big Tarkio River, Missouri, 1910 [33 U. S. C. A. §24].
Nodaway River, Missouri, 1910 [33 U. S. C. A. §37].
One Hundred and Two River, Missouri, 1910 [33 U. S. C. A. §40].
Mill Slough, Oregon, 1913 [33 U. S. C. A. §34].
Swan Creek, Toledo, Ohio, 1915 [33 U. S. C. A. §45].
Cache River, Arkansas, 1916 [33 U. S. C. A. §25].

sional intent can not be manifested *informally* in any of the usual ways, *e. g.*, by acquiescence in administrative construction and application of the Act by the Secretary of War, and by acceptance of the reports of surveys made by direction of Congress and action (and non-action) in accordance with these reports. Congressional recognition of such reports is given in section 3(8)[27] of the Federal Water Power Act of 1920, defining "navigable waters" as including such

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Bayou Meto, Arkansas, 1917 [33 U. S. C. A. §22].
Mosquito Creek, South Carolina, 1917 [33 U. S. C. A. §36].
Ollala Slough, Oregon, 1917 [33 U. S. C. A. §39].
Saint Marys River, Ohio and Indiana, 1917 [33 U. S. C. A. §43].
Little River, Arkansas, from Big Lake to Marked Tree, 1919 [33 U. S. C. A. §33].
Bayou Cocodrie, Louisiana, 1921 [33 U. S. C. A. §21].
Platte River, Missouri, 1921 [33 U. S. C. A. §42].
Lake George, Mississippi, 1922 [33 U. S. C. A. §32].
Tchula Lake, Mississippi, 1922 [33 U. S. C. A. §46].
Bear Creek, Mississippi, 1923 [33 U. S. C. A. §23].
Eagle Lake, Louisiana-Mississippi, 1926 [33 U. S. C. A. §47].
Noxubee River, Mississippi, 1934 [33 U. S. C. A. §48].
East River, Wisconsin, 1935 [33 U. S. C. A. §29a].
Bayou Saint John, in New Orleans, 1936 [33 U. S. C. A. §49].
Turtle Bay and Turtle Bayou, Texas, 1937 [33 U. S. C. A. §50].
Scajaquada Creek, New York, 1937 [33 U. S. C. A. §51].
Park River, Connecticut, 1937 [33 U. S. C. A. §52].
Benton Harbor Canal, Michigan, 1937 [33 U. S. C. A. §53].
Burr Creek, Bridgeport, Connecticut, 1937 [33 U. S. C. A. §54].
Bayou Savage (or Chantilly), in New Orleans, 1937 [33 U. S. C. A. §55].
Other waters [33 U. S. C. A. §§26, 26a, 26b, 27, 27a, 38].

[27] Appendix, *infra*, 41.

parts of streams as "shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority".[28] True, this definition is inclusive, not exclusive; nevertheless it attests the *Congressional status of War Department recommendations to Congress after investigation under its authority.*

Congress and the entire Government, before and ever since 1899, have recognized that, *at least for practical purposes,* the Susquehanna is not, and cannot by "reasonable" improvements be made, navigable for useful commerce. As the lower Court holds, SECRETARY TAFT's decision, when made, "was clearly right". [R. 2319; 123 F. 2d 162; *supra,* 12]. It is likewise clear that Congress did *not* intend to prohibit—or outlaw—petitioner's dam. The Congressional intent is clear, whether the action manifesting the intent amounts to an estoppel or not.[29]

C.

PETITIONER'S DAM IS *NOT* UNLAWFULLY OPERATED AND MAINTAINED.

Whether Congress be regarded as "construing" the Act of 1899, *as applicable to the Susquehanna,* or as *consenting* to the maintenance of petitioner's dam, the result is the same. In either aspect, the dam is *not* unlawfully maintained.

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[28] Appendix, *infra,* 41, 42.

[29] *Monongahela Navigation Co. v. United States,* 148 U. S. 312, 313, 334-335; *Lewis Blue Point Oyster Co. v. Briggs,* 229 U. S. 82, 89; *Greenleaf Lumber Company v. Garrison,* 237 U. S. 251, 266. *Cf. United States v. Southern Power Co.,* 4 Cir., 31 F. 2d 852.

The "consent of Congress", required by the Constitution with respect to an agreement or compact between states, may be either express or *implied*, prior or subsequent.[30] No more formality is necessary with respect to the self-imposed requirement of the "consent of Congress" under the Act of 1899. In the instant case the consent of Congress is *implied* (if not expressed) in the acts and statements of the executive, legislative and judicial departments of the Government for many years before and since the dam was built, including SECRETARY TAFT's practical administrative construction, followed by the Government for at least ten years and, as to things then done, for 34 years [*supra,*].

The lower Court holds that this consent of Congress was ineffective because the plans for petitioner's dam were not approved by the Secretary of War and the Chief of Engineers under section 9 of the Rivers and Harbors Act of 1899 [R. 2318; 123 F. 2d 162]. But the reports of the survey made under the Rivers and Harbors Act of 1919 amount to full approval of the completed dam itself [*supra,* 15-16]. Indeed, the consent of Congress *after* completion of the dam necessarily carries with it approval of the plans and locations. Furthermore, this consent of Congress, like the special acts relating to particular waters, manifested an intent to exclude the lower Susquehanna from *all* the requirements of the Act of 1899 concerning navigable waters [*supra,* 34-36].

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[30] *Virginia v. Tennessee,* 148 U. S. 503, 521-523. *Cf. Safe Harbor Water Power Corporation v. Federal Power Commission,* 3 Cir., —— F. 2d ——, decided December 2, 1941; "The Compact Clause of the Constitution," Messrs. Frankfurter and Landis, selected Essays on Constitutional Law, Vol. 3, p. 1606; Yale Law Journal, Vol. XXXIV, p. 685.

D.

CONGRESS DID *NOT*, BY THE ACT OF 1935, AUTHORIZE THE COMMISSION TO *RETROACTIVELY OVERRULE* SECRETARY TAFT'S AND MR. FRANKFURTER'S ADMINISTRATIVE CONSTRUCTION OF THE ACT OF 1899, *AS APPLIED TO THE SUSQUEHANNA RIVER*, SO AS TO OUTLAW A DAM BUILT ON THE FAITH OF THAT CONSTRUCTION AND MAINTAINED WITHOUT GOVERNMENTAL OBJECTION FOR 25 YEARS.

On December 18, 1903 the exhaustive report to Congress of the survey directed by the Rivers and Harbors Act of 1902 demonstrated that use of an "improved" waterway in the Susquehanna for commercial purposes was impracticable and such an "improvement" was undesirable [*supra*, 9-10]. On March 8, 1904 SECRETARY TAFT made his decision in the case of the Pennsylvania railroad bridge at Havre de Grace [*supra*, 10-12]. From 1905 to 1910 petitioner's dam was built—and also both the Pennsylvania and B. & O. bridges at Havre de Grace. In 1913, SECRETARY TAFT's decision was followed by MR. FRANKFURTER [*supra*, 5, 10-14].

In 1914 the Judge Advocate General expressed the view that SECRETARY TAFT's decision was "erroneous in law" (principally on the point *not* involved in the instant case, viz., the effect of navigability of isolated reaches in two states). He recommended that SECRETARY TAFT's decision be not *further* followed in new matters—but *not* that it be overruled retroactively [*supra*, 14].

In 1926 the voluminous reports to Congress of the survey directed by the Rivers and Harbors Act of 1919 contained a full statement of the legal status of petitioner's dam under SECRETARY TAFT's decision and the Pennsylvania decree of January 14, 1907, and expressed the opinion [1] that it was a question for the courts "whether the Federal laws for the protection and preservation

of navigation could be invoked to require the company to build locks necessary to pass the dam", but [2] that "definite legal power to enforce the construction of locks" was conferred by the Pennsylvania decree [*supra*, 15-16]. This opinion necessarily excluded any possibility that *under existing laws* the Commission or the Government could destroy the dam—or exact ransom for *not* destroying it.

In 1935, at the Commission's request, Congress enacted amendments, "all minor", to the Federal Water Power Act of 1920. The Commission now contends—and the lower Court holds—that two of these "minor" amendments [sections 4(g) and 23(b)] empower the Commission to destroy the dam or to exact ransom for *not* doing so.

The result does violence, not only to the fair meaning of the words of the Act of 1935, but also to established doctrine as to administrative construction of statutes and judicial construction of the powers of administrative bodies. By statute administrative authorities are given broad powers, which they may exercise *for the future*, often with little regard for the past so far as precedents are concerned. By the same token they can *not*, by retroactive action, reach back into the past and devour the fruits of their own or their predecessors' past action.[31] In this aspect, the question is not one of constitutional power, but of construction, viz., whether the United States "prefers to consider itself civilized and to act accordingly". [*Disconto-Gesellschaft v. United States Steel Corp.*, 267 U. S. 22, 28].

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[31] *Helvering v. Reynolds Tobacco Co.*, 306 U. S. 110, 116, 117, *Cf. Arizona Groc. Co. v. Atchison, Topeka & Sante Fe Ry. Co.*, 284 U. S. 370, 389.

The decision below is also fundamentally opposed to the *Appalachian* case, on which it purports to rest. *If* the general language of section 4(g) gives the Commission universal power to destroy—or hold to ransom—any "obstruction", licensed or unlicensed, lawfully or unlawfully constructed, *then* licenses are unnecessary and futile. *If* existing law recognizes no distinction between *constructing* a dam without a license and *continuing* to *maintain* and *operate* one constructed with the consent of Congress, express or implied, prior or subsequent, *then* a license has no practical relation to "national planning", and "to deny the privilege of constructing an obstruction" or to "grant the privilege on terms" [311 U. S. 426, 427] is a useless preliminary to destroying the obstruction after it is completed—or holding it to ransom.

For the reasons stated the writ of certiorari should be granted.

Respectfully submitted,

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